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No. 88-2030.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1988.

RICHARD LISA AND
TINA LISA,
Petitioners,
v.

FOURNIER MARINE CORPORATION,
McALLISTER LIGHTERAGE LINE, INC., AND
PENOBSCOT BAY TOWING CO., INC.
Respondents.

RESPONDENT McALLISTER LIGHTERAGE LINE, INC.'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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August 11, 1989

Questions Presented.

I. Whether the petition meets the standards set forth in Supreme Court Rule 17.

II. Whether the Court of Appeals correctly held that the trial court acted within its discretion in bifurcating the trial into a status phase and a liability/damages phase.

III. Whether the Court of Appeals correctly held that the trial court properly stated the law regarding seaman status in his charge to the jury and that petitioners failed to explain their objection to the charge on vessel status.

IV. Whether the Court of Appeals correctly held that the trial judge acted within his discretion by hearing evidence as to other sales outside the jury.

V. Whether the Court of Appeals correctly held that the trial court properly submitted the two written questions to the jury at the close of the liability and damages trial.

VI. Whether the Court of Appeals correctly held that petitioners' allegations that the trial judge was not impartial and was prejudiced were insufficient.

List of Parties.

Petitioners are Richard Lisa and Tina Lisa.

Respondents are Fournier Marine Corporation, Penobscot Bay Towing Co., Inc., and McAllister Lighterage Line, Inc.

Rule 28.1 Statement.

McAllister Lighterage Line, Inc. is wholly owned by McAllister Brothers, Inc. McAllister Brothers, Inc. is wholly owned by McAllister Towing and Transportation Company, Inc. McAllister Towing and Transportation Company, Inc. is a closely held corporation.

Table of Contents.

Questions Presented	i
List of Parties	ii
Rule 28.1 Statement	iii
Table of Contents	v
Table of Authorities	vi
Statute Involved	2
Statement of the case	3
Reasons why a writ of certiorari should not be granted	4
I. The petition fails to meet the standards set forth in Supreme Court Rule 17	4
II. The Court of Appeals correctly held that the trial court acted within its discretion in bifurcating the trial into a status phase and a liability/damages phase	6
III. The Court of Appeals correctly held that the trial court properly stated the law regarding seaman status in his charge to the jury and that petitioners failed to explain their objection to the charge on vessel status	7
IV. The Court of Appeals correctly held that the trial judge acted within his discretion by hearing evidence as to other sales outside the jury	8
V. The Court of Appeals correctly held that the trial judge acted within his discretion by hearing evidence as to other sales outside the jury	10
VI. The Court of Appeals correctly held that petitioners' allegations that the trial judge was not impartial and was prejudiced were insufficient	14
Conclusion	15

TABLE OF AUTHORITIES.

CASES.

Bennett v. Perini Corp., 510 F.2d 114 (1st Cir. 1975) 7, 8

Bevard v. Ajax Mfg. Co., 473 F.Supp.35 (E.D. Mich 1979) 11

Crummet v. Corbin, 475 F.2d 816 (6th Cir. 1973) 6

Cruz v. Texaco, Inc., 589 F.Supp.777 (S.D. Ill. 1984) 12

Joia v. Jo-Ja Service Corp., 817 F.2d 908 (1st Cir. 1987) 11

Joseph E. Bennett Co. v. Trio Industries, Inc., 306 F.2d 546 (1st Cir. 1962) 15

McPhail v. Culebra, 598 F.2d 603 (1st Cir. 1979) 12

Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976) 11

Pugh v. S.C. Hutchinson Co., 565 F.2d 375 (5th Cir. 1978) 10

Scott v. Isbrandtsen Co., 327 F.2d 113 (4th Cir. 1964) 10

Stapinski v. Walsh Construction Co., Inc., 395 N.E. 2d 1251 (Ind. 1979) 13

Sukljian v. Charles Ross and Son Co., 503 N.E. 2d 1358 (N.Y. 1986) 13

STATUTES AND RULES.

33 U.S.C. § 905(b) 2, 6

Federal Rules of Appellate Procedure
Rule 38 5

Federal Rules of Civil Procedure
Rule 11 5
Rule 42(b) 6, 7

Rule 49(a) 11
Rule 51 10, 11

Federal Rules of Evidence
Rule 402 8
Rule 403 8
Rule 611 9

Supreme Court Rules
Rule 17 1, 4

MISCELLANEOUS.

Restatement (Second) of Torts, § 388 12, 13

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RESPONDENT McALLISTER LIGHTERAGE LINE, INC.'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The respondent, McAllister Lighterage Line, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 866 F.2d 530.

Statute Involved.

33 U.S.C.S. § 905(b) states:

> (b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person; or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 USCS 933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Statement of the Case.

The respondent (defendant) wishes to supplement the petitioners' (plaintiffs') statement of the case as follows:

Prior to the taking of evidence, numerous motions were filed by the defendants individually and jointly. The most notable was a joint motion by all defendants that the trial be bifurcated to determine the status of the plaintiff, Richard Lisa, and whether the Barge 175 was a vessel. Judge Aldrich heard arguments on this motion and allowed defendants' motion for a bifurcated trial.

On March 24, 1988, evidence commenced on the threshold issue of plaintiff's status and whether the Barge 175 was a vessel on the date of Richard Lisa's injury. After two days of evidence, special questions were formulated by the court with the assistance of counsel and presented to the jury. The jury found that the Barge 175 was not a vessel and that the plaintiff was a harbor worker engaged in the repair of the Barge 175. After this determination by the jury, all counts against Fournier Marine Corporation consisting of the Counts I through IV inclusive were dismissed. Similarly, Counts IV and V against Penobscot Bay Towing Co., Inc. were also dismissed. The claim against McAllister Lighterage Line, Inc. in paragraph 26 alleging breach of warranty of seaworthiness was similarly dismissed.

At the conclusion of the status portion of the trial, the only remaining defendant in the action was McAllister Lighterage Line, Inc. The trial proceeded forward upon the allegations set forth in paragraph 27 of the amended complaint alleging negligence for a failure to warn of a dangerous condition. The evidence on this portion of the case commenced on March 30, 1988. After four days of testimony, Judge Aldrich, with the assistance and agreement of all counsel, propounded two questions to the jury for their deliberation. After closing arguments

and charge to the jury, the jury retired to deliberate and returned an answer in the affirmative to the first question, "Was Arthur Fournier fully aware, at the time of sale, of there being a possibly dangerous atmosphere in the barge's confined tanks?" Pursuant to the court's instructions, this concluded the action by dismissal of the amended complaint against McAllister Lighterage Line, Inc. Judgment was entered by the Court on April 7, 1988, dismissing the count against McAllister Lighterage Line, Inc.

The plaintiffs filed motions for vacation of judgment, new judgment and new trial. Judge Aldrich considered these motions and denied plaintiffs' motions on April 7, 1988.

On April 21, 1988, the plaintiffs filed their notice of appeal.

The First Circuit affirmed the decisions below on February 3, 1989 and assessed double costs and attorneys' fees against the plaintiff. A petition for rehearing and suggestion for a rehearing en banc was denied on March 14, 1989.

Petitioners filed their petition for a writ of certiorari on June 12, 1989.

Reasons Why a Writ of Certiorari Should Not Be Granted.

I. THE PETITION FAILS TO MEET THE STANDARDS SET FORTH IN SUPREME COURT RULE 17.

Supreme Court Rule 17 provides a review on writ of certiorari will be granted only when there are special and important reasons therefor. The petitioner's argument for review is a mere reiteration of their Court of Appeals argument. The Petition presents no conflict among the Circuit Courts of Appeal in respect to the issues in this case. No valid basis has been presented in the petition which indicates that the First Circuit has so far departed from the accepted and usual course of

judicial proceedings as to warrant review by this Court. The First Circuit fully considered and correctly decided the issues below.

In respect to the petitioners' claims regarding Rules 11 and 38, the respondent states these allegations are immaterial and beyond the scope of review of this Court. Rule 38 of the Rules of Federal Appellate Procedure provides "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Rule 38 is the correlative appellate rule of Rule 11 of the Federal Rules of Civil Procedure. Rule 11 provides for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings.

The issues presented in the petition are not worthy of the Court's valuable time and resources. The issues simply are not ones of national importance. The *Lisa* decision below is not unique because it involves injuries sustained by a ship repairer. The number of ship repairers constitutes an extremely minute fraction of this country's population. The number of ship repairers who are injured, and whose cases are tried to juries is an even smaller fraction, if such a group of individuals can even be identified. Any decision by the Court on the issues raised in petitioners' brief will have an effect on so few people in this country that the issue does not warrant the time of this Honorable Court. This Honorable Court will be addressing issues presented to it this term which will have dramatic effects on much greater segments of our population.

In view of the common nature of this case, the lack of conflict among the circuits over the issues presented, and the lack of conflict between the opinion below and the applicable decisions of this Court, review by this Honorable Court is not warranted.

II. The Court of Appeals Correctly Held That the Trial Court Acted Within Its Discretion in Bifurcating the Trial into a Status Phase and a Liability/Damages Phase.

Rule 42(b) of the Federal Rules of Civil Procedure provides that a trial judge may bifurcate the trial of a matter into separate trials ". . . in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy. . ." The ordering of separate trials on issues is within the sound discretion of the trial judge. *Crummett* v. *Corbin*, 475 F.2d 816 (6th Cir. 1973).

In the case below, several complex issues regarding the applicable standards of care and liability of the various defendants were directly affected by a determination of whether the plaintiff, Richard Lisa, was a seaman or a harbor worker. The applicable law was also directly affected by a determination of whether the Barge 175 was or was not a vessel on April 11, 1985.

As presented to the trial court, a separate trial on the issues of the plaintiff's status and the status of the Barge 175 as a vessel will be dispositive and will prevent an unnecessary trial on liability and damages. If the jury found that the plaintiff was not a Jones Act seaman, then the plaintiffs' exclusive remedy would be supplied by the Longshoremen and Harbor Workers Compensation Act. The Court would, therefore, not need to address the issue of Jones Act negligence, unseaworthiness and maintenance and cure under the General Maritime Law. Likewise, if the determination is made that the Barge 175 is not a vessel, the Court will not need to address the defendants' potential 33 U.S.C. § 905(b) negligence.

Plaintiffs' counsel had been aware of defendants' request for bifurcation as early as the pre-trial conference before Judge Tauro on March 16, 1987, some twelve months before argu-

ment to the trial court. Upon hearing, plaintiff did not present any meritorious objection as to why trial should not be bifurcated other than for witness inconvenience.

The determination of the plaintiff's status and the Barge 175 status were crucial threshold findings to the remaining issues at trial. The jury's determination on the status issue eliminated unsupported allegations, dismissed two defendants from the remainder of the trial and reduced all the legal allegations to a single count of negligence against McAllister Lighterage Line, Inc. This clearly supports the propriety of the court's ruling fostering both an expeditious determination and judicial economy.

The Court of Appeals correctly held that the trial court acted properly within its discretion by ordering separate trials for the purposes as those set forth in Rule 42(b).

III. The Court of Appeals Correctly Held That the Trial Court Properly Stated the Law Regarding Seaman Status in His Charge to the Jury and That Petitioners Failed To Explain Their Objection to the Charge on Vessel Status.

The Court of Appeals properly found that the plaintiffs' appeal argument concerning the charge on vessel status was without merit. In their petition for certiorari, the petitioners have only restated and reiterated this position without clarification.

In the charge concerning seaman status, the trial court properly instructed the jury concerning the factors to be considered and found necessary in determining whether Mr. Lisa was a seaman. The instructions presented by the trial court were legally correct and consistent with the First Circuit's decision in *Bennett* v. *Perini Corp.*, 510 F.2d 114 (1st Cir. 1975).

Plaintiffs' counsel initially admitted that he did not have any objections to the charge. Then in lobby, plaintiffs' counsel raised certain objections to the charge. The charge by the court clearly followed the standards of *Bennett*, *supra*. The court provided the plaintiffs with a charge covering the "fleet assignment" concept and adequately instructed the jury on the requirements necessary to be found a seaman.

Likewise, the charge concerning the vessel's status was proper and within the requirements of the controlling case law.

IV. The Trial Judge Acted within His Discretion by Hearing Evidence As to Other Sales Outside the Jury.

Federal Rule of Evidence 402 provides that relevant evidence is generally admissible. Rule 403 limits this admissibility by providing that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

Prior to trial, McAllister Lighterage Line, Inc. filed a motion in limine concerning sales made by other "McAllister entities" to the Fournier Marine Corporation and Penobscot Bay Towing Company, Inc. This motion was filed in anticipation of the plaintiffs' counsel intention to offer evidence that various other McAllister corporations had sold used equipment to buyers in the past. The relevant evidence, however, was that only two used barges had been sold by McAllister Lighterage Line, Inc. to Penobscot Bay Towing Company, Inc. in the last two years. During the oral argument on the motion, the trial court ruled in favor of McAllister Lighterage Line, Inc. on the motion in limine. The trial court then agreed, after a colloquy with plain-

tiffs' counsel, to hear the proffered evidence in the absence of the jury for the purpose of reconsidering its ruling should the court find that the evidence was relevant.

Following the initial status phase of the trial, the trial court again met with counsel to discuss the presentation of evidence concerning McAllister Lighterage Line, Inc.'s sales of used equipment. The issue of other McAllister corporations sales as evidence of McAllister Lighterage Line, Inc.'s status as a merchant was reviewed. The trial judge then confirmed his agreement to hear this evidence outside of the jury. This was acceptable to plaintiffs' counsel during the conference. This ruling actually was in plaintiffs' favor because it provided the opportunity to hear the evidence, and then if necessary, to have it heard by the jury.

The decision of the trial court to hear the evidence of the other sales was consistent with Fed. R. Evid. 611, which provides the court *shall* exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. It was also by agreement of the parties.

The evidence of other instances of disposing of used equipment by other McAllister corporations was superfluous and would only have confused the jury and was not relevant. The plaintiff had not pled that McAllister Lighterage Line, Inc. was a merchant as part of his negligence claim nor had he pled a claim for strict liability. There were no amendments at trial to conform to the evidence and the only theory of recovery against McAllister Lighterage Line, Inc. was that it negligently failed to warn Penobscot Bay Towing Company of the condition of the barge when it disposed of this used equipment.

There was no evidence presented through the testimony of Arthur J. Fournier or Brian McAllister, which supported a claim that McAllister Lighterage Line, Inc. was a merchant in the sale of barges. The only evidence elicited at trial was consistent with the argument presented in McAllister Lighter-

age Line, Inc.'s motion in limine regarding sales: to wit, McAllister Lighterage Line, Inc. had, on two occasions over many years sold used equipment to Fournier interests that it no longer needed.

The trial court acted within his discretion by taking this evidence outside the jury. Plaintiff waived raising this issue by agreeing to this procedure in chambers. Even if the trial court did abuse its discretion, it was harmless error as the plaintiff had not pled a claim based upon strict liability or breach of warranty and all the evidence supported a finding that McAllister Lighterage Line, Inc. was not in the business of selling barges.

V. The Trial Court Properly Submitted the Two Written Questions to the Jury at the Close of the Liability and Damages Trial.

The petitioners have assigned as error the form of the special interrogatories submitted to the jury and the charge concerning those questions. This was not raised by the plaintiffs at the Appeals Court level and now for the first time is argued before this Honorable forum.

The number and form of special interrogatories rests in the sound discretion of the trial judge. *Scott* v. *Isbrandtsen Co.*, 327 F.2d 113 (4th Cir. 1964). The failure to object to the form of special interrogatories is reviewed under the same standard as the failure to object to a jury instruction. *Pugh* v. *S.C. Hutchinson Co.*, 565 F.2d 375 (5th Cir. 1978)

Rule 51 of the Federal Rules of Civil Procedure provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which

he objects and the grounds of his objection." *Joia* v. *Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987).

Prior to closing arguments and the charge to the jury, counsel met with the trial judge to discuss the form of the special interrogatories to be submitted to the jury pursuant to Fed. R. Civ. P. 49(a). Both parties had previously submitted their written requests for special questions to the court. After a discussion of the proposed requests by McAllister Lighterage Line, Inc.'s counsel, the following colloquy occurred:

THE COURT: Fine and dandy. Any comments, Mr. Greenberg?
MR. GREENBERG: No, Your Honor.
THE COURT: Fine. Let's see if we can find the jury.

Counsel met with the trial judge following the charge to the jury and upon inquiry by the trial judge, plaintiff's counsel stated, "I am satisfied." The plaintiffs therefore, are barred from raising the issue of an improper jury charge in the appeal. *Morris* v. *Travisono*, 528 F.2d 856 (1st Cir. 1976)

The respondent submits that there was no error in the framing of the special questions. The questions were in accordance with the present state of the law and the evidence presented at trial. The evidence at trial clearly established that in selling the Barge 175 to Penobscot Bay Towing Company, McAllister Lighterage Line, Inc. was disposing of used equipment, for which it no longer had use. There was no evidence presented at trial that McAllister Lighterage Line, Inc. was a merchant or a seller regularly engaged in the business of selling barges. Therefore, since the plaintiff pled a negligence theory only, the standard to which McAllister Lighterage Line, Inc. was to be held was that of "a reasonably prudent seller under the existing circumstances." See *Bevard* v. *Ajax Mfg. Co.*, 473 F.Supp. 35 (E.D. Mich 1979).

This duty is analogous to the standard set forth in the Restatement (Second) of Torts, § 388:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for use, it is supplied if the supplier:
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition for the facts which make it likely to be dangerous.

In *Cruz* v. *Texaco, Inc.*, 589 F.Supp. 777 (S.D. Ill, 1985), the estate of a driver of a winch truck sued the former owner (Texaco) who had sold the truck to the decedent's employer. The plaintiff alleged Texaco negligently failed to warn the driver that the winch truck should not be driven at high speeds while carrying heavy objects. Texaco moved for summary judgment on the grounds that the dangerous condition was understood by decedent's employer and that the truck had been sold "as is." The court granted summary judgment for Texaco after examining two factual issues: whether the employer knew about the danger and whether the employer was sufficiently involved in directing the use of the truck. See *McPhail* v. *Municipality of Culebra*, 598 F.2d 603 (1st Cir. 1979).

In the case below, the jury found that Arthur Fournier, the principal of Penobscot Bay Towing Co., Inc., knew and appreciated the danger of entering confined spaces. Also, the only evidence presented at trial was that Penobscot Bay Towing Co., Inc. had a small crew of which the plaintiff was a member, that Arthur J. Fournier directly supervised its employees and conducted regular meetings with the crew. At the time of the injury, Arthur J. Fournier was present, near the barge, acting in a supervisory capacity.

Similarly, in *Stapinski* v. *Walsh Construction Co., Inc.*, 395 N.E.2d 1251 (Ind. 1979), the Indiana Supreme Court upheld the granting of summary judgment to a non-dealer seller of a truck which had been sold "as is, where is" to an employer whose driver was in an accident with the plaintiff. Although it expressly did not accept or reject § 388, the court held that a non-dealer who sells a motor vehicle "as is" cannot be liable to a bystander. *Id.* at 1254.

The Court of Appeals of New York recognized the application of § 388 in a similar factual situation to the instant case in *Sukljian* v. *Charles Ross and Son Co.*, 503 N.E. 2d 1358 (N.Y. 1986). General Electric, the remote seller of a grinding mill on an "as is" basis moved for summary judgment on plaintiff's claims of negligence and strict liability. The Court of Appeals held that a remote seller who invited the inspection of the mill by the purchaser and who sold the mill on an "as is" basis was not liable under negligence or strict liability for a failure to warn of the mill's defects. In dicta, the court noted "at most, the duty of a casual or occasional seller would be to warn the person to whom the product is supplied of known defects that are not obvious or readily discernible." *Id.* at 1362, citing Restatement (Second) of Torts, § 388.

Similarly, in the instant case, Arthur J. Fournier on behalf of Penobscot Towing Co., Inc. purchased the barge on an "as is, where is" basis from a casual seller. The jury's finding that

Arthur J. Fournier had knowledge of the possibly dangerous atmosphere thus relieves McAllister Lighterage Line, Inc. of liability for Lisa's accident.

VI. The Court of Appeals Correctly Held That Petitioners' Allegations That the Trial Judge Was Not Impartial and Was Prejudiced Were Insufficient.

The Court of Appeals held that plaintiffs' allegations of bias were insufficient. McAllister Lighterage Line, Inc. submits that the trial was conducted in a fair manner. The trial court, in fact, made several rulings that were adverse to McAllister Lighterage Line, Inc. and favorable to the plaintiff.

For example, the trial court struck the entire testimony of David DuBois, an expert called by McAllister Lighterage Line, Inc. Further, the trial court ruled that the atmosphere inside the void compartment was a defective condition and that the barge was dangerous when it was sold by McAllister Lighterage Line, Inc. The trial court also permitted the admission into evidence and the testimony of plaintiffs' expert concerning a June, 1987, medical report which was not provided to McAllister Lighterage Line, Inc.'s counsel despite an outstanding request for production of documents.

Other examples of the trial court's favorable rulings in favor of the plaintiffs and impartiality were that it denied McAllister Lighterage Line, Inc.'s motion to bifurcate the liability and damages on the second phase of the trial. McAllister Lighterage Line, Inc. had moved for bifurcation on the grounds that evidence of the plaintiffs' substantial damages will prejudice the jury's determination as to the defendant's liability. The trial court also ruled that there was *no evidence of contributory negligence* on the part of the plaintiff even though Arthur J. Fournier, the plaintiff's supervisor, testified that he had

instructed the crew on several occasions as well as leaving literature available in the office concerning to safe tank entry procedures.

As the First Circuit panel pointed out, a charge of judicial misconduct is never supported by mere reference to adverse rulings and findings. See *Joseph E. Bennett Co.* v. *Trio Industries, Inc.*, 306 F.2d 546 (1st Cir. 1962).

The allegation that the judge was unfair is without substantive merit and is singularly biased. A review of the record establishes that the trial court correctly applied the law and gave ample opportunity to the plaintiffs to present their claims.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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